SEP 22 1944
CHARLES ELMORE CROPLEY
CLERK

No. 399

# In the Supreme Court of the United States

OCTOBER TERM, 1944

THE FAIRMONT CREAMERY COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 10 |
| Appendix | 11 |


## CITATIONS


Cases:

*International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72 ..... 9

*National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584 ..... 9

*National Labor Relations Board* v. *Nevada Consolidated Copper Corporation*, 316 U. S. 105 ..... 9

*Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U. S. 533 ..... 9

Statute:

National Labor Relations Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C., Supp. V, Secs. 151 et seq.):

Sec. 7 ..... 11

Sec. 8 (1) ..... 9, 11

Sec. 8 (3) ..... 9, 11




609740—44

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 399

THE FAIRMONT CREAMERY COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 419–427) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 12–44, 48–51) are reported in 52 N. L. R. B. 75.

### JURISDICTION

The decree of the court below (R. 428–429) was entered on July 17, 1944. The petition for rehearing filed by petitioner was denied on July 29, 1944 (R. 452). The petition for a writ of

certiorari was filed on August 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

## QUESTION PRESENTED

Whether there is substantial evidence to support the Board's finding that petitioner unlawfully discharged employees Dye and McDaniel because of their union membership and activities.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 11.

## STATEMENT

Upon the usual proceedings, the Board on August 23, 1943, issued its findings of fact, conclusions of law, and order (R. 12–44, 48–51). The relevant facts found by the Board may be summarized as follows:[1]

A. *The background of the discharges.*—The unionization of petitioner's plant was begun shortly before September 12, 1942 (R. 15, 49; 64). On that day Leroy Black, one of petitioner's employees who was a member of the Chauffeurs, Teamsters, and Helpers Union, affiliated with the

[1] In the following statement, the references preceding the semicolon are to the Board's findings and the succeeding references are to the supporting evidence.

American Federation of Labor, distributed Union pamphlets at petitioner's garage (R. 15; 63–65, 158). Shortly thereafter Evert, petitioner's plant manager (R. 15; 64), came into the garage and, noting that employee Perley had Union literature in his hand, asked Perley where he had obtained such literature (R. 15; 64–65, 158–159, 234–235, 285). Perley replied that Black had given it to him (R. 15; 234–235), whereupon Evert called Black and Perley "bolsheviks" and said, "If you can't kick them damn cusses out of here, I can" (R. 15; 65). Black and Perley then expressed dissatisfaction with the wages which they were receiving (R. 15; 65, 64, 67, 236). Evert told Perley he could get his time whenever he wished (R. 15–16; 67). Black quit immediately, and Perley left the next morning (R. 16, 236, 66–67). The following day Evert agreed to increase the wages of two other employees, Richardson and Crane, who had witnessed the events of the preceding day, and promised to give them a bonus if they would remain in petitioner's employ (R. 16; 66–68). Evert by his actions succeeded in ending further efforts of petitioner's employees to organize until the spring of 1943 (R. 16; 68–69).

On May 1, 1943, Richardson obtained some Union applications from Ivan Hibbard, whose father ran a local market (R. 16; 68–69, 122–123). Richardson gave some of the blanks to Ardis Dye

and Lawrence Black[2] (R. 17; 68–69). Evert, having heard of Hibbard's activities, endeavored to persuade Hibbard's father to prevail upon his son to stop his Union activities (R. 27; 124–125). When the latter refused, petitioner terminated its business relations with Hibbard's father (R. 27; 122–128, 131). Thereafter, on May 8, Evert injected himself into the employees' organizational efforts by asking employee Crane to find out the employees' attitude toward the Union (R. 17; 155–156), by interrogating employee Smalley concerning Union activities, and by expressing approval when Smalley advised him that he had not joined the Union (R. 17–18; 184). Evert questioned employee Barnes and endeavored to have him withdraw from the Union, advising him that most of the employees to whom he [Evert] had talked were ready to resign (R. 18–19; 85). Evert also sought to disparage the Union in the eyes of Barnes by advising him that it could not secure a wage increase because wages were frozen, that if the men joined the Union their earnings would suffer because the Union would insist on shorter hours, and that the employees would have to pay all their own truck expenses (R. 18–19;

[2] Lawrence Black, one of petitioner's truck drivers, was discharged by Evert on May 15, 1943, under circumstances which the Board found were violative of Section 8 (3) and (1) of the Act (R. 37–40). The Board's findings with relation to this discharge were upheld by the court below, and petitioner raises no questions here with respect to Black's discharge.

85–86). On the same day Evert addressed similar arguments to employee Mayfield and asserted that if the Union were successful Mayfield would be permanently assigned to an undesirable country run (R. 19; 191–192).

On May 15, Evert called Barnes to his office, interrogated him in the presence of several of the petitioner's department heads, accused him of having engaged in Union activities while on duty, and said, "You haven't got sense enough to know what you are trying to pull" (R. 26; 89–91). Evert then called Barnes an opprobrious name, stating that it also applied to other members of the Union (R. 26; 90), and threatened to discharge him (R. 26; 89–91). Petitioner also engaged in surveillance of a Union meeting held on May 11, 1943 (R. 23–24; 72–73, 198–199, 209–210, 214–215, 341–342, 347–348); it withdrew from the employees privileges previously accorded them by forbidding them to leave the plant during ten-minute rest periods in mid-morning and mid-afternoon (R. 27–29; 261–262); and, having thus confined the employees to its premises, petitioner posted a notice which further hindered their organizing activities by restricting their conversations or activities on Company time or property to those necessary to perform their regular work (R. 27–29; 261–262, 411).

B. *The discharges.*—Petitioner discharged employees Victor McDaniel and Ardis Dye on May 8 and 10, respectively (R. 32, 34, 147, 58).

Victor McDaniel was a trained hatchery man, admittedly a difficult employee to replace (R. 33–34; 327).[3] He joined the Union on April 23, 1943, and solicited members for it among his fellow-employees (R. 34; 146). On the day of his discharge his foreman, Harris, inquired of employee Simmons "if McDaniel was pushing the Union," stating that he had heard that he was (R. 34; 179). On May 6, 1943, McDaniel requested and received permission from Foreman Harris to be absent from his work on May 8 in order to haul feed for his livestock on a small farm which he owned (R. 32–33; 146–147). After attending to the hauling of the feed McDaniel went to petitioner's plant at about one p. m. in order to get some grain which he had purchased (R. 33; 147). He was then called to Evert's office and discharged because, it was claimed, he was not utilizing the time given him for the purpose intended, and because of his excessive absences (R. 33; 147). Foreman Harris admitted, however, that McDaniel had never been absent from work without permission; that he had not recommended McDaniel's discharge; and that he had retained McDaniel in spite of occasional absences because it was difficult to replace a man of McDaniel's qualifications (R. 33–34; 335–336, 337).

[3] McDaniel was employed by petitioner intermittently for four or five years prior to his discharge (R. 144).

Ardis Dye was discharged on May 10, 1943, the reasons given her at the time being that her work was unsatisfactory, that she lacked interest in her work, and was absent excessively. At the hearing, however, petitioner introduced no evidence to support the contention that her work had been unsatisfactory (R. 34). She operated a bottling machine in petitioner's creamery department, a position of admitted responsibility (R. 34; 163). Mrs. Dye is the mother of two small children, and at the time of her employment Foreman Carey agreed to give her leave of absence to arrange for the care of her children (R. 35; 160–163). In March and April of the same year she was given further time off for the same purpose (R. 35; 163–164–165). None of these absences was considered by petitioner when they occurred to have been other than legitimate and justified (R. 35–36; 162–165, 174). On May 8, 1943, Dye asked her roommate, Olive Owston, to inform Foreman Carey that she would not be in to work that day until after the departure of the 12:45 p. m. train (R. 36; 167, 175). Her roommate, however, delivered the message incorrectly and merely informed Carey that Dye would not report for work until noon (R. 36; 222). The departure of the train was delayed for several hours, and Mrs. Dye did not report for work that afternoon (R. 36; 167). She returned to work the following Mon-

day morning and, although she tried to explain her absence to Foreman Carey, he refused to listen (R. 36; 176). On the following Monday, upon instructions from Evert, Carey discharged Dye for the asserted reason that her absences from work had been too frequent (R. 36; 169, 297, 303). Only a short time before her discharge Assistant Foreman Briggs had praised her work and asked her to assist in training new employees (R. 34–35; 166). Foreman Carey also commended her work as well as her attitude (R. 35; 169–170, 304–305). On May 7, 1943, just three days prior to her discharge, Carey had asked her to suggest an employee best qualified to operate the bottling machine (R. 166). Dye had joined the Union on May 6, started soliciting memberships on May 7, and within a few days had secured fifteen applications for the Union (R. 36; 166–168).

On the foregoing findings the Board concluded (R. 42, 49) that petitioner had discriminated in regard to the hire and tenure of employment of McDaniel and Dye, in violation of Section 8 (3) and (1) of the Act, and ordered their reinstatement with back pay. The court below entered a decree of enforcement (R. 428–429).

## ARGUMENT

Th sole question presented is whether the Board's conclusion that petitioner had discharged employees McDaniel and Dye because of their

union membership and activities, and in violation of Section 8 (3) and (1) of the Act, is supported by substantial evidence. No question of general importance is involved, and the evidence summarized in the Statement, pp. 2–8, *supra,* affords ample support for the challenged findings.

In cases such as this the Board must appraise the relevant facts in the light of their background as part of a "pattern of events," and not as isolated fragments. *National Labor Relations Board* v. *Link-Belt Co.,* 311 U. S. 584, 588; *Virginia Electric and Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 539. The Board was not required to consider only those events immediately connected with the discharges of Dye and McDaniel, "divorced from the events immediately preceding and following" such discharges. *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 78. The court below properly concluded that the credibility of the witnesses, the weight of the evidence, and the inferences to be drawn therefrom, were for the Board to determine; and although the evidence was conflicting and would have supported a contrary finding, there was clearly sufficient support for the finding which was made. *National Labor Relations Board* v. *Nevada Consolidated Copper Corporation,* 316 U. S. 105, 107.

## CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
*Solicitor General.*

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
THOMAS B. SWEENEY,
*Attorneys,*
*National Labor Relations Board.*

SEPTEMBER 1944.